

**BLUMENTHAL, NORDREHAUG & BHOWMIK**

Norman B. Blumenthal (State Bar #068687)

Kyle R. Nordrehaug (State Bar #205975)

Aparajit Bhowmik (State Bar #248066)

2255 Calle Clara

La Jolla, CA 92037

Telephone: (858)551-1223

Facsimile: (858) 551-1232

Website: [www.bamlawca.com](http://www.bamlawca.com)

Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

JACQUELINE CAVALIER NELSON,  
an individual, on behalf of herself, and  
on behalf of all persons similarly  
situated,

Plaintiff,

vs.

AVON PRODUCTS, INC., a New York  
Corporation; and DOES 1 through 50  
inclusive,

Defendants.

Case No. **CV13-02276 EJD**

**FIRST AMENDED CLASS ACTION  
COMPLAINT FOR:**

1. UNFAIR COMPETITION IN  
VIOLATION OF CAL. BUS. & PROF.  
CODE §§ 17200, *et seq.*;

2. FAILURE TO PAY OVERTIME  
COMPENSATION IN VIOLATION OF  
CAL. LAB. CODE §§ 510, 1194 AND  
1198, *et seq.*;

3. FAILURE TO PROVIDE ACCURATE  
ITEMIZED STATEMENTS IN  
VIOLATION OF CAL. LAB. CODE §  
226; and,

4. LABOR CODE PRIVATE ATTORNEY  
GENERAL ACT [LABOR CODE § 2698  
*et seq.*].

**DEMAND FOR A JURY TRIAL**

1 Plaintiff Jacqueline Cavalier Nelson ("PLAINTIFF"), on behalf of herself and all other  
2 similarly situated current and former employees, alleges on information and belief, except for her  
3 own acts and knowledge, the following:

4 **THE PARTIES**

5 1. Defendant Avon Products, Inc. ("AVON" or "DEFENDANT") at all relevant times  
6 mentioned herein conducted and continues to conduct substantial and regular business throughout  
7 the State of California.

8 2. AVON was founded in 1886 and has grown to become the world's largest direct  
9 seller of beauty and beauty-related products, with more than \$11 billion in annual revenue in  
10 2011. AVON markets its products to women in more than 100 countries through more than 6  
11 million active independent Sales Representative in regions around the world. The company's  
12 lineup includes cosmetics, fragrances, toiletries, jewelry, apparel, home furnishings, and more.

13 3. Plaintiff Jacqueline Cavalier Nelson has been employed by AVON as a District  
14 Sales Manager in California and classified as a salaried employee exempt from receiving  
15 overtime wages since April of 2008 and continues to be employed in this position as of the filing  
16 of this Complaint.

17 4. To successfully compete against the other beauty product providers, AVON  
18 substantially reduces labor costs by placing the burden of work on a smaller number of employees  
19 that were classified by AVON as exempt from overtime wages. The goal of overtime laws  
20 includes expanding employment throughout the workforce by putting financial pressure on the  
21 employer and nurturing a stout job market, as well as the important public policy goal of  
22 protecting employees in a relatively weak bargaining position against the unfair scheme of  
23 uncompensated overtime work. An employer's obligation to pay its employees wages is more  
24 than a matter of private concern between the parties. That obligation is founded on a compelling  
25 public policy judgment that employees are entitled to work a livable number of hours at a livable  
26 wage. In addition, statutes and regulations that compel employers to pay overtime relate to  
27 fundamental issues of social welfare worthy of protection. The requirement to pay overtime  
28 wages extends beyond the benefits individual workers receive because overtime wages

1 discourage employers from concentrating work in a few overburdened hands and encourage  
2 employers to instead hire additional employees. Especially in today's economic climate, the  
3 importance of spreading available work to reduce unemployment cannot be overestimated.

4         5. As part of their business, AVON employs a fleet of "District Sales Managers." The  
5 finite set of tasks required to be performed by the District Sales Managers are to spend the vast  
6 majority of their time in the field training AVON's independent contractors and recruiting  
7 potential new hires to become independent contractors and sell AVON's beauty products, filling  
8 out pre-formatted forms and processing the new sales representatives, attending weekly webinars  
9 and teleconferences regarding AVON's sales goals, and reading material provided by AVON in  
10 order to learn about new beauty products all in accordance with AVON's established specific  
11 procedures and protocols which govern and control every aspect of the work performed by the  
12 PLAINTIFF and other District Sales Managers.

13         6. The position of District Sales Manager was represented by AVON to the  
14 PLAINTIFF and the other District Sales Managers as a salaried position exempt from overtime  
15 wages and other related benefits.

16         7. Plaintiff Jacqueline Cavalier Nelson was required to spend the majority of her time  
17 engaging in the non-exempt promotional work of recruiting persons to become independent  
18 contractor sales representatives of AVON and then educating these independent contractors about  
19 AVON's product line. Although promotional work can constitute exempt sales work if the  
20 promotional activity is incidental to, or done in conjunction with, the employees' outside sales  
21 work, here the promotional work was done in advance of sales made by someone else other than  
22 the PLAINTIFF and other District Sales Managers and as such their work should not be  
23 considered exempt outside sales work. If the sales representatives wanted to purchase a product  
24 from AVON, then the sales representatives would buy directly from AVON through the use of  
25 AVON's website or through the mail. The PLAINTIFF and other District Sales Managers were  
26 not involved in the sales process between the sales representatives and AVON. As a result of the  
27 lack of managerial duties required of PLAINTIFF and the lack of true outside sales work,  
28 PLAINTIFF and other District Sales Managers should have been properly classified as non-

1 exempt employees entitled to overtime wages and other related benefits.

2       8. To perform their finite set of tasks, the District Sales Managers do not engage in  
3 a supervisory role given the constraints placed upon them by company policy. District Sales  
4 Managers do not determine what work is to be done by other employees or in what time frame.  
5 Furthermore, District Sales Managers also have no role in training other employees of AVON or  
6 determining what training they are to receive. The District Sales Managers do not have the  
7 authority to hire, fire, or promote other employees. District Sales Managers also do not have the  
8 authority to determine other employees' pay rates or benefits, or give raises as they are unable  
9 to make employment-related, personnel decisions. Disciplinary decisions are made by the human  
10 resources department or dictated by company policies. As a result, the District Sales Managers  
11 are engaged in a type of work that requires no exercise of independent judgment or discretion as  
12 to any matter of significance. Therefore, the PLAINTIFF and all the other District Sales  
13 Managers are "managers" in name only because they do not have managerial duties or authority  
14 and should therefore be properly classified as non-exempt employees.

15       9. Plaintiff Jacqueline Cavalier Nelson brings this Class Action on behalf of herself  
16 and a California class, defined as all persons who are or previously were employed by Defendant  
17 Avon Products, Inc. in California as District Sales Managers and were classified as exempt from  
18 overtime wages (the "CALIFORNIA CLASS") at any time during the period beginning on the  
19 date four (4) years prior to the filing of this Complaint and ending on the date as determined by  
20 the Court (the "CALIFORNIA CLASS PERIOD").

21       10. The work schedule for the PLAINTIFF and other CALIFORNIA CLASS Members  
22 is set by AVON. The PLAINTIFF and other CALIFORNIA CLASS Members work regularly  
23 in excess of eight (8) hours in a workday and more than forty (40) hours in any given workweek.

24       11. PLAINTIFF and the other CALIFORNIA CLASS Members are not provided with  
25 overtime compensation, are also not afforded their meal and/or rest breaks and other benefits  
26 required by law as a result of being classified as "exempt" by AVON.

27       12. As a matter of company policy, practice, and procedure, AVON has uniformly,  
28 unlawfully, unfairly and/or deceptively classified every District Sales Manager as exempt based

1 on job title alone, failed to pay the required overtime compensation and otherwise failed to  
2 comply with all applicable labor laws with respect to these District Sales Managers.

3 13. The true names and capacities, whether individual, corporate, subsidiary,  
4 partnership, associate or otherwise of Defendants DOES 1 through 50, inclusive, are presently  
5 unknown to the PLAINTIFF who therefore sues these Defendants by such fictitious names  
6 pursuant to Fed. R. Civ. Proc. 17. The PLAINTIFF will seek leave to amend this Complaint to  
7 allege the true names and capacities of DOES 1 through 50, inclusive, when they are ascertained.  
8 PLAINTIFF is informed and believes, and based upon that information and belief alleges, that  
9 the Defendants named in this Complaint, including DOES 1 through 50, inclusive, are responsible  
10 in some manner for one or more of the events and happenings that proximately caused the injuries  
11 and damages hereinafter alleged.

12 14. The agents, servants and/or employees of the Defendants and each of them  
13 acting on behalf of the Defendants acted within the course and scope of his, her or its authority  
14 as the agent, servant and/or employee of the Defendants, and personally participated in the  
15 conduct alleged herein on behalf of the Defendants with respect to the conduct alleged herein.  
16 Consequently, the acts of each Defendants are legally attributable to the other Defendants and all  
17 Defendants are jointly and severally liable to the PLAINTIFF and the other members of the  
18 CALIFORNIA CLASS, for the loss sustained as a proximate result of the conduct of the  
19 Defendants' agents, servants and/or employees.

### 20 THE CONDUCT

21 15. The finite set of tasks required of the District Sales Managers as defined by  
22 DEFENDANT are executed by the District Sales Managers through the performance of non-  
23 exempt labor within a defined clerical skill set.

24 16. Although the PLAINTIFF and the other District Sales Managers perform non-  
25 exempt tasks, DEFENDANT instituted a blanket classification policy, practice and procedure by  
26 which all of these District Sales Managers are classified as exempt from overtime compensation  
27 and related benefits. By reason of this uniform exemption practice, policy and procedure  
28 applicable to the PLAINTIFF and the other District Sales Managers who perform these non-

1 exempt tasks, DEFENDANT committed acts of unfair competition in violation of the California  
 2 Unfair Competition law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* (the "UCL"), by engaging in  
 3 a company-wide policy, practice and procedure which fails to properly classify the PLAINTIFF  
 4 and the other District Sales Managers and thereby fails to pay them overtime wages for  
 5 documented overtime hours worked. The proper classification of these employees is  
 6 DEFENDANT's burden. As a result of DEFENDANT's intentional disregard of the obligation  
 7 to meet this burden, DEFENDANT fails to pay all required overtime compensation for work  
 8 performed by the members of the CALIFORNIA CLASS and violated the California Labor Code  
 9 and regulations promulgated thereunder as herein alleged. In addition, DEFENDANT fails to  
 10 provide all of the legally required meal and rest breaks to the PLAINTIFF and the other  
 11 CALIFORNIA CLASS Members as required by the applicable Wage Order and Labor Code.  
 12 During the CALIFORNIA CLASS PERIOD, DEFENDANT did not have a policy or practice  
 13 which provided meal and rest breaks to the PLAINTIFF and the other CALIFORNIA CLASS  
 14 Members. As a result, DEFENDANT's failure to provide the PLAINTIFF and the  
 15 CALIFORNIA CLASS with all legally required meal and rest breaks is evidenced by  
 16 DEFENDANT's business records which contain no record of these breaks.

17 17. DEFENDANT, as a matter of law, has the burden of proving that (a) employees  
 18 are properly classified as exempt and that (b) DEFENDANT otherwise complies with applicable  
 19 laws.

20 18. PLAINTIFF and the other CALIFORNIA CLASS Members employed by  
 21 DEFENDANT are not engaged in work of a type that was or now is performed more than half  
 22 of their working time away from the employer's place of business performing sales-related  
 23 activities. PLAINTIFF and the other CALIFORNIA CLASS Members employed by  
 24 DEFENDANT are also not engaged in work of a type that was or now is compensated by a  
 25 exempt commission scheme in that PLAINTIFF and other CALIFORNIA CLASS Members are  
 26 not paid according to the structure outlined in California Code of Regulations § 11040(3)(A) that  
 27 provides:

28 The provisions of subsections (A), (B) and (C) [of the Wage Order] above

1 shall not apply to any employee whose earnings exceed one and one-half (1  
2 1/2) times the minimum wage if more than half of that employee's  
compensation represents commissions.

3 Instead, the PLAINTIFF and CALIFORNIA CLASS Members were and are compensated in such  
4 a manner that they fall outside of the "inside salesperson" or "commissioned salesperson"  
5 exemption, and should therefore be properly classified as non-exempt employees entitled to  
6 overtime compensation.

7 19. During their employment with DEFENDANT, the PLAINTIFF and the other  
8 CALIFORNIA CLASS Members, performs non-managerial, non-exempt tasks, but are  
9 nevertheless classified by DEFENDANT as exempt from overtime pay and work from time to  
10 time more than eight (8) hours in a workday and in excess of forty (40) hours in any given  
11 workweek.

12 20. PLAINTIFF and the other District Sales Managers employed by DEFENDANT are  
13 not engaged in work of a type that was or now is directly related to the management or general  
14 business operations of the employer's customers, when giving these words a fair but narrow  
15 construction. PLAINTIFF and the other District Sales Managers employed by DEFENDANT  
16 are also not engaged in work of a type that was or now is performed at the level of the policy or  
17 management of DEFENDANT. PLAINTIFF and the other District Sales Managers employed  
18 by DEFENDANT are also not engaged in work requiring knowledge of an advanced type in a  
19 field or science or learning customarily acquired by a prolonged course of specialized intellectual  
20 instruction and study, but rather their work involved the performance of routine mental, clerical,  
21 and/or sales related tasks. PLAINTIFF and the other District Sales Managers employed by  
22 DEFENDANT are also not engaged in work that is intellectual and varied in character, but rather  
23 is routine mental, clerical, and/or physical work that is of such character that the output produced  
24 or the result accomplished can be standardized in relation to a given period of time. The work  
25 of a District Sales Manager of DEFENDANT is work wherein the PLAINTIFF and the members  
26 of the CALIFORNIA CLASS are engaged in the day-to-day business of DEFENDANT. The  
27 District Sales Managers perform the finite set of tasks of spending the vast majority of their time  
28 in the field training AVON's independent contractors and recruiting potential new hires to



1 become independent contractors and sell AVON's beauty products, filling out pre-formatted  
2 forms and processing the new sales representatives, attending weekly webinars and  
3 teleconferences regarding AVON's sales goals, and reading material provided by AVON in order  
4 to learn about new beauty products in accordance with DEFENDANT's established specific  
5 procedures and protocols which govern and control every aspect of the work performed by the  
6 PLAINTIFF and other CALIFORNIA CLASS Members.

7       21. District Sales Managers are classified as exempt from California overtime and  
8 related laws by DEFENDANT, however, these employees do not have managerial duties or  
9 authority and are therefore managers in name only. District Sales Managers perform these  
10 ongoing day-to-day clerical and sales activities and they have no role in supervising employees  
11 and have no authority to make employment-related decisions relating to DEFENDANT's  
12 employees. Furthermore, the District Sales Managers do not exercise discretion or independent  
13 judgment as to matters of significance, and their job duties are not directly related to  
14 DEFENDANT's management policies or general business operation.

15       22. PLAINTIFF and all members of the CALIFORNIA CLASS are and were uniformly  
16 classified and treated by DEFENDANT as exempt at the time of hire and thereafter,  
17 DEFENDANT failed to take the proper steps to determine whether the PLAINTIFF, and the  
18 members of the CALIFORNIA CLASS, were properly classified under the applicable Industrial  
19 Welfare Commission Wage Order (Wage Order 4-2001) and Cal. Lab. Code §§ 510, *et seq.* as  
20 exempt from applicable California labor laws. Since DEFENDANT affirmatively and wilfully  
21 misclassified the PLAINTIFF and the members of the CALIFORNIA CLASS in compliance with  
22 California labor laws, DEFENDANT's practices violated and continue to violate California law.  
23 In addition, DEFENDANT acted deceptively by falsely and fraudulently telling the PLAINTIFF  
24 and each member of the CALIFORNIA CLASS that they were exempt from overtime pay when  
25 DEFENDANT knew or should have known that this statement was false and not based on known  
26 facts. DEFENDANT also acted unfairly by violating the California labor laws, and as a result  
27 of this policy and practice, DEFENDANT also violated the UCL. In doing so, DEFENDANT  
28 cheated the competition by paying the CALIFORNIA CLASS less than the amount competitors



1 paid who complied with the law and cheated the CALIFORNIA CLASS by not paying them in  
2 accordance with California law.

3       23. DEFENDANT also failed to provide and still fails to provide the PLAINTIFF and  
4 the other CALIFORNIA CLASS Members with a wage statement in writing that accurately sets  
5 forth gross wages earned, all applicable hourly rates in effect during the pay period and the  
6 corresponding number of hours worked at each hourly rate by the PLAINTIFF and the other  
7 CALIFORNIA CLASS Members. This conduct violated California Labor Code § 226. The pay  
8 stub also does not accurately display anywhere the PLAINTIFF's and the other CALIFORNIA  
9 CLASS Members' overtime hours and applicable rates of overtime pay for the pay period.

10       24. By reason of this uniform conduct applicable to the PLAINTIFF and all the  
11 CALIFORNIA CLASS Members, DEFENDANT committed acts of unfair competition in  
12 violation of the California Unfair Competition law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* (the  
13 "UCL"), by engaging in a uniform company-wide policy and procedure which fails to correctly  
14 classify the PLAINTIFF and the CALIFORNIA CLASS of District Sales Managers as non-  
15 exempt. The proper classification of these employees is DEFENDANT's burden. As a result of  
16 DEFENDANT's intentional disregard of the obligation to meet this burden, DEFENDANT failed  
17 to properly calculate and/or pay all required overtime compensation for work performed by the  
18 members of the CALIFORNIA CLASS and violated the applicable Wage Order, the California  
19 Labor Code and the regulations promulgated thereunder as herein alleged.

20       25. Plaintiff Jacqueline Cavalier Nelson has worked as a District Sales Manager for  
21 DEFENDANT and has been classified as a salaried employee exempt from receiving overtime  
22 pay since April of 2008 and continues to be employed in this position as of the filing of this  
23 Complaint. PLAINTIFF performs the finite set of tasks of spending the vast majority of her time  
24 in the field training AVON's independent contractors and recruiting potential new hires to  
25 become independent contractors and sell AVON's beauty products, filling out pre-formatted  
26 forms and processing the new sales representatives, attending weekly webinars and  
27 teleconferences regarding AVON's sales goals, and reading material provided by AVON in order  
28 to learn about new beauty products in accordance with DEFENDANT's established specific

1 procedures and protocols which govern and control every aspect of the work performed by the  
2 PLAINTIFF. During the CALIFORNIA CLASS PERIOD, PLAINTIFF as an District Sales  
3 Manager, has been classified by DEFENDANT as exempt from overtime pay and regularly works  
4 in excess of eight (8) hours in a workday and more than forty (40) hours in a workweek, but as  
5 a result of DEFENDANT's misclassification of PLAINTIFF as exempt from the applicable  
6 California Labor Code provisions, PLAINTIFF is not compensated by DEFENDANT for her  
7 overtime hours worked at the applicable overtime rate and DEFENDANT also fails to provide  
8 PLAINTIFF with her meal and rest breaks. In addition, PLAINTIFF has not been provided with  
9 accurate and itemized wage statements showing the gross wages earned, the net wages earned,  
10 all applicable hourly rates in effect during the pay period, including overtime hourly rates, and  
11 the corresponding number of hours worked at each hourly rate, by DEFENDANT during the  
12 CALIFORNIA CLASS PERIOD in violation of Cal. Lab. Code 226(a).

### 13 14 **THE CALIFORNIA CLASS**

15 26. PLAINTIFF brings the First Cause of Action for Unfair, Unlawful and Deceptive  
16 Business Practices pursuant to Cal. Bus. & Prof. Code §§ 17200, *et seq.* (the "UCL") as a Class  
17 Action, pursuant to Fed R. Civ. Proc. 23(b)(2) and/or (3), on behalf of a California Class, defined  
18 as all persons who are or previously were employed by Defendant Avon Products, Inc. in  
19 California as District Sales Managers and were classified as exempt from overtime wages (the  
20 "CALIFORNIA CLASS") at any time during the period beginning on the date four (4) years prior  
21 to the filing of this Complaint and ending on the date as determined by the Court (the  
22 "CALIFORNIA CLASS PERIOD").

23 27. To the extent equitable tolling operates to toll claims by the CALIFORNIA  
24 CLASS against DEFENDANT, the CALIFORNIA CLASS PERIOD should be adjusted  
25 accordingly.

26 28. DEFENDANT, as a matter of corporate policy, practice and procedure, and in  
27 violation of the applicable Labor Code, Industrial Welfare Commission ("IWC") Wage Order  
28 Requirements, and the applicable provisions of California law, intentionally, knowingly, and

1 wilfully, engages in a practice whereby DEFENDANT uniformly, unfairly, unlawfully, and  
2 deceptively instituted a practice to ensure that the employees employed in a District Sales  
3 Manager position were not properly classified as non-exempt from the requirements of California  
4 Labor Code §§ 510, *et seq.*

5 29. DEFENDANT has the burden of proof to make sure that each and every employee  
6 is properly classified as exempt from the requirements of the Cal. Lab. Code §§ 510, *et seq.*  
7 DEFENDANT, however, as a matter of uniform and systematic policy and procedure had in place  
8 during the CALIFORNIA CLASS PERIOD and still has in place a policy and practice that  
9 misclassifies the CALIFORNIA CLASS Members as exempt. DEFENDANT's uniform policy  
10 and practice in place at all times during the CALIFORNIA CLASS PERIOD and currently in  
11 place is to systematically classify each and every CALIFORNIA CLASS Member as exempt from  
12 the requirements of the California Labor Code §§ 510, *et seq.* This common business practice  
13 applicable to each and every CALIFORNIA CLASS Member can be adjudicated on a class-wide  
14 basis as unlawful, unfair, and/or deceptive under Cal. Business & Professions Code §§ 17200,  
15 *et seq.* (the "UCL") as causation, damages, and reliance are not elements of this claim.

16 30. At no time before or during the PLAINTIFF's employment with DEFENDANT  
17 was any District Sales Manager reclassified as non-exempt from the applicable requirements of  
18 California Labor Code §§ 510, *et seq.* after each CALIFORNIA CLASS Member was initially,  
19 uniformly, and systematically classified as exempt upon being hired.

20 31. Any individual declarations of any employees offered at this time purporting to  
21 indicate that one or more District Sales Managers may have been properly classified is of no force  
22 or affect absent contemporaneous evidence that DEFENDANT's uniform system did not  
23 misclassify the PLAINTIFF and the other CALIFORNIA CLASS Members as exempt pursuant  
24 to Cal. Lab. Code §§ 510, *et seq.* absent proof of such a contemporaneous system,  
25 DEFENDANT's business practice is uniformly unlawful, unfair and/or deceptive under the UCL  
26 and may be so adjudicated on a class-wide basis. As a result of the UCL violations, the  
27 PLAINTIFF and the CALIFORNIA CLASS Members are entitled to compel DEFENDANT to  
28

1 provide restitutionary disgorgement of their ill-gotten gains into a fluid fund in order to restitute  
2 these funds to the PLAINTIFF and the CALIFORNIA CLASS Members according to proof.

3 32. The CALIFORNIA CLASS is so numerous that joinder of all CALIFORNIA  
4 CLASS Members is impracticable.

5 33. DEFENDANT uniformly violated the rights of the CALIFORNIA CLASS under  
6 California law by:

- 7 (a) Violating the California Unfair Competition laws, Cal. Bus. & Prof. Code  
8 §§ 17200, *et seq.* (the "UCL"), by unlawfully, unfairly and/or deceptively  
9 having in place company policies, practices and procedures that uniformly  
10 misclassified the PLAINTIFF and the members of the CALIFORNIA  
11 CLASS as exempt;
- 12 (b) Committing an act of unfair competition in violation of the UCL, by  
13 unlawfully, unfairly, and/or deceptively failing to have in place a company  
14 policy, practice and procedure that accurately determined the amount of  
15 working time spent by the PLAINTIFF and the members of the  
16 CALIFORNIA CLASS performing non-exempt labor;
- 17 (c) Committing an act of unfair competition in violation of the UCL, by having  
18 in place a company policy, practice and procedure that failed to reclassify  
19 as non-exempt those members of the CALIFORNIA CLASS whose actual  
20 tasks were comprised of non-exempt job functions;
- 21 (d) Committing an act of unfair competition in violation of the UCL, by  
22 violating Cal. Lab. Code §§ 510, *et seq.*, by failing to pay the correct  
23 overtime pay to the PLAINTIFF and the members of the CALIFORNIA  
24 CLASS who were improperly classified as exempt, and retaining the unpaid  
25 overtime to the benefit of DEFENDANT; and,
- 26 (e) Committing an act of unfair competition in violation of the UCL, by  
27 violating Cal. Lab. Code § 226.7, by failing to provide all mandatory meal  
28

1 and/or rest periods to the PLAINTIFF and the CALIFORNIA CLASS  
2 Members.

3 34. This Class Action meets the statutory prerequisites for the maintenance of a  
4 Class Action pursuant to Fed R. Civ. Proc. 23(b)(2) and/or (3), in that:

- 5 (a) The persons who comprise the CALIFORNIA CLASS are so numerous that  
6 the joinder of all such persons is impracticable and the disposition of their  
7 claims as a class will benefit the parties and the Court;
- 8 (b) Nearly all factual, legal, statutory, and declaratory relief issues that are  
9 raised in this Complaint are common to the CALIFORNIA CLASS will  
10 apply uniformly to every member of the CALIFORNIA CLASS;
- 11 (c) The claims of the representative PLAINTIFF are typical of the claims of  
12 each member of the CALIFORNIA CLASS. PLAINTIFF, like all the other  
13 members of the CALIFORNIA CLASS, was initially classified as exempt  
14 upon hiring based on the defined corporate policies and practices and  
15 labored under DEFENDANT's systematic procedure that failed to properly  
16 classify as non-exempt the PLAINTIFF and the members of the  
17 CALIFORNIA CLASS. PLAINTIFF sustained economic injury as a result  
18 of DEFENDANT's employment practices. PLAINTIFF and the members  
19 of the CALIFORNIA CLASS were and are similarly or identically harmed  
20 by the same unlawful, deceptive, unfair and pervasive pattern of misconduct  
21 engaged in by DEFENDANT by deceptively advising all District Sales  
22 Managers that they were exempt from overtime wages based on the defined  
23 corporate policies and practices, and unfairly failing to pay overtime to  
24 these employees who were improperly classified as exempt; and,
- 25 (d) The representative PLAINTIFF will fairly and adequately represent and  
26 protect the interest of the CALIFORNIA CLASS, and has retained counsel  
27 who are competent and experienced in Class Action litigation. There are no  
28

1 material conflicts between the claims of the representative PLAINTIFF and  
2 the members of the CALIFORNIA CLASS that would make class  
3 certification inappropriate. Counsel for the CALIFORNIA CLASS will  
4 vigorously assert the claims of all employees in the CALIFORNIA CLASS.

5  
6 35. In addition to meeting the statutory prerequisites to a Class Action, this Action  
7 is properly maintained as a Class Action pursuant to Fed R. Civ. Proc. 23(b)(2) and/or  
8 (3), in that:

9 (a) Without class certification and determination of declaratory, statutory and  
10 other legal questions within the class format, prosecution of separate actions  
11 by individual members of the CALIFORNIA CLASS will create the risk of:

12 1) Inconsistent or varying adjudications with respect to individual  
13 members of the CALIFORNIA CLASS which would establish  
14 incompatible standards of conduct for the parties opposing the  
15 CALIFORNIA CLASS; and/or,

16 2) Adjudication with respect to individual members of the  
17 CALIFORNIA CLASS which would as a practical matter be  
18 dispositive of interests of the other members not party to the  
19 adjudication or substantially impair or impede their ability to protect  
20 their interests.

21 (b) The parties opposing the CALIFORNIA CLASS have acted or refused to  
22 act on grounds generally applicable to the CALIFORNIA CLASS, making  
23 appropriate class-wide relief with respect to the CALIFORNIA CLASS as  
24 a whole in that DEFENDANT uniformly classified and treated the District  
25 Sales Managers as exempt and, thereafter, uniformly fail to take proper  
26 steps to determine whether the District Sales Managers are properly  
27 classified as exempt, and thereby denied these employees overtime wages  
28

as required by law;

- 1) With respect to the First Cause of Action, the final relief on behalf of the CALIFORNIA CLASS sought does not relate exclusively to restitution because through this claim the PLAINTIFF seeks declaratory relief holding that DEFENDANT's policy and practices constitute unfair competition, along with incidental equitable relief as may be necessary to remedy the conduct declared to constitute unfair competition;

(c) Common questions of law and fact exist as to the members of the CALIFORNIA CLASS, with respect to the practices and violations of California law as listed above, and predominate over any question affecting only individual CALIFORNIA CLASS Members, and a Class Action is superior to other available methods for the fair and efficient adjudication of the controversy, including consideration of:

- 1) The interests of the members of the CALIFORNIA CLASS in individually controlling the prosecution or defense of separate actions in that the substantial expense of individual actions will be avoided to recover the relatively small amount of economic losses sustained by the individual CALIFORNIA CLASS Members when compared to the substantial expense and burden of individual prosecution of this litigation;
- 2) Class certification will obviate the need for unduly duplicative litigation that would create the risk of:
  - A. Inconsistent or varying adjudications with respect to individual members of the CALIFORNIA CLASS, which would establish incompatible standards of conduct for DEFENDANT; and/or,



B. Adjudications with respect to individual members of the CALIFORNIA CLASS would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests;

- 3) In the context of wage litigation because as a practical matter a substantial number of individual CALIFORNIA CLASS Members will avoid asserting their legal rights out of fear of retaliation by DEFENDANT, which may adversely affect an individual's job with DEFENDANT or with a subsequent employer, the Class Action is the only means to assert their claims through a representative; and,
- 4) A Class Action is superior to other available methods for the fair and efficient adjudication of this litigation because class treatment will obviate the need for unduly and unnecessary duplicative litigation that is likely to result in the absence of certification of this Action pursuant to Fed R. Civ. Proc. 23(b)(2) and/or (3).

36. This Court should permit this Action to be maintained as a Class Action pursuant to Fed R. Civ. Proc. 23(b)(2) and/or (3), because:

- (a) The questions of law and fact common to the CALIFORNIA CLASS predominate over any question affecting only individual CALIFORNIA CLASS Members because DEFENDANT's employment practices were uniform and systematically applied with respect to the CALIFORNIA CLASS;
- (b) A Class Action is superior to any other available method for the fair and efficient adjudication of the claims of the members of the CALIFORNIA CLASS because in the context of employment litigation a substantial number of individual CALIFORNIA CLASS Members will avoid asserting

1                   their rights individually out of fear of retaliation or adverse impact on their  
2                   employment;

3           (c)    The members of the CALIFORNIA CLASS are so numerous that it is  
4                   impractical to bring all members of the CALIFORNIA CLASS before the  
5                   Court;

6           (d)    PLAINTIFF, and the other CALIFORNIA CLASS Members, will not be  
7                   able to obtain effective and economic legal redress unless the action is  
8                   maintained as a Class Action;

9           (e)    There is a community of interest in obtaining appropriate legal and  
10                  equitable relief for the acts of unfair competition, statutory violations and  
11                  other improprieties, and in obtaining adequate compensation for the injuries  
12                  which DEFENDANT's actions have inflicted upon the CALIFORNIA  
13                  CLASS;

14          (f)    There is a community of interest in ensuring that the combined assets of  
15                  DEFENDANT are sufficient to adequately compensate the members of the  
16                  CALIFORNIA CLASS for the injuries sustained;

17          (g)    DEFENDANT has acted or refused to act on grounds generally applicable  
18                  to the CALIFORNIA CLASS, thereby making final class-wide relief  
19                  appropriate with respect to the CALIFORNIA CLASS as a whole;

20          (h)    The members of the CALIFORNIA CLASS are readily ascertainable from  
21                  the business records of DEFENDANT. The CALIFORNIA CLASS  
22                  consists of all DEFENDANT's District Sales Managers who were classified  
23                  as exempt and who were employed in California during the CALIFORNIA  
24                  CLASS PERIOD; and,

25          (i)    Class treatment provides manageable judicial treatment calculated to bring  
26                  an efficient and rapid conclusion to all litigation of all wage and hour  
27                  related claims arising out of the conduct of DEFENDANT as to the  
28

1 members of the CALIFORNIA CLASS.

2 37. DEFENDANT maintains records from which the Court can ascertain and identify  
3 by name and job title, each of DEFENDANT's employees who have been systematically,  
4 intentionally and uniformly subjected to DEFENDANT's corporate policy, practices and  
5 procedures as herein alleged. PLAINTIFF will seek leave to amend the Complaint to include any  
6 additional job titles of similarly situated employees when they have been identified.

7  
8 **THE CALIFORNIA LABOR SUB-CLASS**

9 38. PLAINTIFF further brings the Second and Third Causes of Action on  
10 behalf of a California sub-class, defined as all members of the CALIFORNIA CLASS who were  
11 employed by DEFENDANT in California (the "CALIFORNIA LABOR SUB-CLASS") during  
12 the period beginning on the date three (3) years prior to the filing of the action and ending on the  
13 date as determined by the Court (the "CALIFORNIA LABOR SUB-CLASS PERIOD") pursuant  
14 to pursuant to Fed R. Civ. Proc. 23(b)(2) and/or (3).

15 39. DEFENDANT, as a matter of corporate policy, practice and procedure,  
16 and in violation of the applicable California Labor Code ("Labor Code"), and Industrial Welfare  
17 Commission ("IWC") Wage Order Requirements intentionally, knowingly, wilfully, and  
18 systematically misclassified the PLAINTIFF and the other members of the CALIFORNIA  
19 CLASS and the CALIFORNIA LABOR SUB-CLASS as exempt from overtime wages and other  
20 labor laws based on DEFENDANT's comprehensive policies and procedures in order to avoid  
21 the payment of overtime wages by misclassifying their positions as exempt from overtime wages  
22 and other labor laws. To the extent equitable tolling operates to toll claims by the CALIFORNIA  
23 LABOR SUB-CLASS against DEFENDANT, the CALIFORNIA LABOR SUB-CLASS  
24 PERIOD should be adjusted accordingly.

25 40. DEFENDANT maintains records from which the Court can ascertain and  
26 identify by job title each of DEFENDANT's employees who as CALIFORNIA LABOR SUB-  
27 CLASS Members have been systematically, intentionally and uniformly misclassified as exempt  
28

1 as a matter of DEFENDANT's corporate policy, practices and procedures. PLAINTIFF will seek  
2 leave to amend the Complaint to include these additional job titles when they have been  
3 identified.

4 41. The CALIFORNIA LABOR SUB-CLASS is so numerous that joinder of all  
5 CALIFORNIA LABOR SUB-CLASS Members is impracticable.

6 42. Common questions of law and fact exist as to members of the CALIFORNIA  
7 LABOR SUB-CLASS, including, but not limited, to the following:

- 8 (a) Whether DEFENDANT unlawfully failed to pay overtime compensation  
9 to members of the CALIFORNIA LABOR SUB-CLASS in violation of the  
10 California Labor Code and California regulations and the applicable  
11 California Wage Order;
- 12 (b) Whether the members of the CALIFORNIA LABOR SUB-CLASS are non-  
13 exempt employees entitled to overtime compensation for overtime hours  
14 worked under the overtime pay requirements of California law;
- 15 (c) Whether DEFENDANT's policy and practice of classifying the  
16 CALIFORNIA LABOR SUB-CLASS Members as exempt from overtime  
17 compensation and failing to pay the CALIFORNIA LABOR SUB-CLASS  
18 Members overtime violate applicable provisions of California law;
- 19 (d) Whether DEFENDANT unlawfully failed to keep and furnish  
20 CALIFORNIA LABOR SUB-CLASS Members with accurate records of  
21 overtime hours worked; and,
- 22 (e) The proper measure of damages and penalties owed to the members of the  
23 CALIFORNIA LABOR SUB-CLASS.

24 43. DEFENDANT, as a matter of corporate policy, practice and procedure, erroneously  
25 classified all District Sales Managers as exempt from overtime wages and other labor laws. All  
26 District Sales Managers, including the PLAINTIFF, performed the same finite set of tasks and  
27 were paid by DEFENDANT according to uniform and systematic company procedures, which,  
28

1 as alleged herein above, failed to correctly pay overtime compensation. This business practice  
2 was uniformly applied to each and every member of the CALIFORNIA LABOR SUB-CLASS,  
3 and therefore, the propriety of this conduct can be adjudicated on a class-wide basis.

4 44. DEFENDANT violated the rights of the CALIFORNIA LABOR SUB-CLASS  
5 under California law by:

- 6 (a) Violating Cal. Lab. Code §§ 510, *et seq.*, by misclassifying and thereby  
7 failing to pay the PLAINTIFF and the members of the CALIFORNIA  
8 LABOR SUB-CLASS the correct overtime pay for a workday longer than  
9 eight (8) hours and a workweek longer than forty (40) hours, for which  
10 DEFENDANT is liable pursuant to Cal. Lab. Code § 1194; and,  
11 (b) Violating Cal. Lab. Code § 226, by failing to provide the PLAINTIFF and  
12 the members of the CALIFORNIA LABOR SUB-CLASS who were  
13 improperly classified as exempt with an accurate itemized statement in  
14 writing showing the gross wages earned, the net wages earned, all  
15 applicable hourly rates in effect during the pay period and the corresponding  
16 number of hours worked at each hourly rate by the employee.

17 45. This Class Action meets the statutory prerequisites for the maintenance of a  
18 Class Action as set forth in pursuant to Fed R. Civ. Proc. 23(b)(2) and/or (3), in that:

- 19 (a) The persons who comprise the CALIFORNIA LABOR SUB-CLASS are  
20 so numerous that the joinder of all such persons is impracticable and the  
21 disposition of their claims as a class will benefit the parties and the Court;  
22  
23 (b) Nearly all factual, legal, statutory, and declaratory relief issues that are  
24 raised in this Complaint are common to the CALIFORNIA LABOR SUB-  
25 CLASS and will apply uniformly to every member of the CALIFORNIA  
26 LABOR SUB-CLASS;  
27 (c) The claims of the representative PLAINTIFF are typical of the claims of  
28

each member of the CALIFORNIA LABOR SUB-CLASS. PLAINTIFF, like all the other members of the CALIFORNIA LABOR SUB-CLASS, was improperly classified as exempt and denied overtime pay as a result of DEFENDANT's systematic classification practices. PLAINTIFF and all the other members of the CALIFORNIA LABOR SUB-CLASS sustained economic injuries arising from DEFENDANT's violations of the laws of California; and,

- (d) The representative PLAINTIFF will fairly and adequately represent and protect the interest of the CALIFORNIA LABOR SUB-CLASS, and has retained counsel who are competent and experienced in Class Action litigation. There are no material conflicts between the claims of the representative PLAINTIFF and the members of the CALIFORNIA LABOR SUB-CLASS that would make class certification inappropriate. Counsel for the CALIFORNIA LABOR SUB-CLASS will vigorously assert the claims of all CALIFORNIA LABOR SUB-CLASS Members.

46. In addition to meeting the statutory prerequisites to a Class Action, this Action is properly maintained as a Class Action pursuant to Fed R. Civ. Proc. 23(b)(2) and/or (3), in that:

- (a) Without class certification and determination of declaratory, statutory and other legal questions within the class format, prosecution of separate actions by individual members of the CALIFORNIA LABOR SUB-CLASS will create the risk of:

- 1) Inconsistent or varying adjudications with respect to individual members of the CALIFORNIA LABOR SUB-CLASS which would establish incompatible standards of conduct for the parties opposing the CALIFORNIA LABOR SUB-CLASS; or,
- 2) Adjudication with respect to individual members of the

CALIFORNIA LABOR SUB-CLASS which would as a practical matter be dispositive of interests of the other members not party to the adjudication or substantially impair or impede their ability to protect their interests.

(b) The parties opposing the CALIFORNIA LABOR SUB-CLASS have acted or refused to act on grounds generally applicable to the CALIFORNIA LABOR SUB-CLASS, making appropriate class-wide relief with respect to the CALIFORNIA LABOR SUB-CLASS as a whole in that DEFENDANT uniformly classified and treated the District Sales Managers as exempt and, thereafter, uniformly failed to take proper steps to determine whether the District Sales Managers are properly classified as exempt, and thereby denied these employees overtime wages as required by law;

(c) Common questions of law and fact predominate as to the members of the CALIFORNIA LABOR SUB-CLASS, with respect to the practices and violations of California law as listed above, and predominate over any question affecting only individual CALIFORNIA LABOR SUB-CLASS Members, and a Class Action is superior to other available methods for the fair and efficient adjudication of the controversy, including consideration of:

- 1) The interests of the members of the CALIFORNIA LABOR SUB-CLASS in individually controlling the prosecution or defense of separate actions in that the substantial expense of individual actions will be avoided to recover the relatively small amount of economic losses sustained by the individual CALIFORNIA LABOR SUB-CLASS Members when compared to the substantial expense and burden of individual prosecution of this litigation;
- 2) Class certification will obviate the need for unduly duplicative



litigation that would create the risk of:

A. Inconsistent or varying adjudications with respect to individual members of the CALIFORNIA LABOR SUB-CLASS, which would establish incompatible standards of conduct for DEFENDANT; and/or,

B. Adjudications with respect to individual members of the CALIFORNIA LABOR SUB-CLASS would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests;

3) In the context of wage litigation because a substantial number of individual CALIFORNIA LABOR SUB-CLASS Members will avoid asserting their legal rights out of fear of retaliation by DEFENDANT, which may adversely affect an individual's job with DEFENDANT or with a subsequent employer, the Class Action is the only means to assert their claims through a representative; and,

4) A Class Action is superior to other available methods for the fair and efficient adjudication of this litigation because class treatment will obviate the need for unduly and unnecessary duplicative litigation that is likely to result in the absence of certification of this Action pursuant to Fed R. Civ. Proc. 23(b)(2) and/or (3).

47. This Court should permit this Action to be maintained as a Class Action pursuant to Fed R. Civ. Proc. 23(b)(2) and/or (3), because:

(a) The questions of law and fact common to the CALIFORNIA LABOR SUB-CLASS predominate over any question affecting only individual CALIFORNIA LABOR SUB-CLASS Members;

(b) A Class Action is superior to any other available method for the fair and efficient adjudication of the claims of the members of the CALIFORNIA

1 LABOR SUB-CLASS because in the context of employment litigation a  
2 substantial number of individual CALIFORNIA LABOR SUB-CLASS  
3 Members will avoid asserting their rights individually out of fear of  
4 retaliation or adverse impact on their employment;

5 (c) The members of the CALIFORNIA LABOR SUB-CLASS are so numerous  
6 that it is impractical to bring all members of the CALIFORNIA LABOR  
7 SUB-CLASS before the Court;

8 (d) PLAINTIFF, and the other CALIFORNIA LABOR SUB-CLASS Members,  
9 will not be able to obtain effective and economic legal redress unless the  
10 action is maintained as a Class Action;

11 (e) There is a community of interest in obtaining appropriate legal and  
12 equitable relief for the acts of unfair competition, statutory violations and  
13 other improprieties, and in obtaining adequate compensation for the  
14 damages and injuries which DEFENDANT's actions have inflicted upon the  
15 CALIFORNIA LABOR SUB-CLASS;

16 (f) There is a community of interest in ensuring that the combined assets of  
17 DEFENDANT are sufficient to adequately compensate the members of the  
18 CALIFORNIA LABOR SUB-CLASS for the injuries sustained;

19 (g) DEFENDANT has acted or refused to act on grounds generally applicable  
20 to the CALIFORNIA LABOR SUB-CLASS, thereby making final class-  
21 wide relief appropriate with respect to the CALIFORNIA LABOR SUB-  
22 CLASS as a whole;

23 (h) The members of the CALIFORNIA LABOR SUB-CLASS are readily  
24 ascertainable from the business records of DEFENDANT. The  
25 CALIFORNIA LABOR SUB-CLASS consists of CALIFORNIA CLASS  
26 Members who were employed by DEFENDANT in California during the  
27 CALIFORNIA LABOR SUB-CLASS PERIOD; and,

28 (i) Class treatment provides manageable judicial treatment calculated to bring

1 a efficient and rapid conclusion to all litigation of all wage and hour related  
 2 claims arising out of the conduct of DEFENDANT.

### 3 **JURISDICTION AND VENUE**

4  
 5 48. This action is brought as a Class Action on behalf of similarly situated employees  
 6 of DEFENDANT pursuant to Fed R. Civ. Proc. 23(b)(2) and/or (3). Defendant removed this  
 7 action to Federal Court from the Superior Court of California, County of Santa Cruz on the basis  
 8 that Defendant contends there is jurisdiction pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453.

9 49. Venue is proper in this Court and judicial district pursuant to 28 U.S.C. § 1391  
 10 because (i) DEFENDANT conducts and conducted substantial business within this judicial  
 11 district and maintains offices in this judicial district, (ii) the causes of action alleged herein arise  
 12 in whole or in part in this judicial district, and (iii) DEFENDANT committed wrongful conduct  
 13 against members of this class in this district. Venue is also proper in this district because the  
 14 complaint was initially filed in the Superior Court of California, County of Santa Cruz, but was  
 15 later removed by DEFENDANT to this Court.

### 16 17 **FIRST CAUSE OF ACTION**

#### 18 **For Unlawful Business Practices**

19 **[Cal. Bus. And Prof. Code §§ 17200, *et seq.*]**

20 **(By PLAINTIFF and the CALIFORNIA CLASS and Against All Defendants)**

21 50. PLAINTIFF, and the other members of the CALIFORNIA CLASS, reallege  
 22 and incorporate by this reference, as though fully set forth herein, paragraphs 1 through 48 of this  
 23 Complaint.

24 51. DEFENDANT is a "person" as that term is defined under Cal. Bus. and Prof.  
 25 Code § 17021.

26 52. California Business & Professions Code §§ 17200, *et seq.* (the "UCL")  
 27 defines unfair competition as any unlawful, unfair, or fraudulent business act or practice. Section  
 28 17203 authorizes injunctive, declaratory, and/or other equitable relief with respect to unfair

1 competition as follows:

2 Any person who engages, has engaged, or proposes to engage in unfair  
3 competition may be enjoined in any court of competent jurisdiction.  
4 The court may make such orders or judgments, including the  
5 appointment of a receiver, as may be necessary to prevent the use or  
6 employment by any person of any practice which constitutes unfair  
7 competition, as defined in this chapter, or as may be necessary to  
8 restore to any person in interest any money or property, real or  
9 personal, which may have been acquired by means of such unfair  
10 competition.

11 California Business & Professions Code § 17203.

12 53. By the conduct alleged herein, DEFENDANT has engaged and continues to engage  
13 in a business practice which violates California law, including but not limited to, Wage Order 4-  
14 2001, the California Code of Regulations, and the California Labor Code Sections 204, 226.7,  
15 510, 512, 1194 & 1198, for which this Court should issue declaratory and other equitable relief  
16 pursuant to Cal. Bus. & Prof. Code § 17203 as may be necessary to prevent and remedy the  
17 conduct held to constitute unfair competition, including restitution of wages wrongfully withheld.

18 54. By the conduct alleged herein, DEFENDANT's practices are unlawful and  
19 unfair in that these practices violate public policy, are immoral, unethical, oppressive,  
20 unscrupulous or substantially injurious to employees, and are without valid justification or utility  
21 for which this Court should issue equitable and injunctive relief pursuant to Section 17203 of the  
22 California Business & Professions Code, including restitution of wages wrongfully withheld.

23 55. Throughout the CALIFORNIA CLASS PERIOD, it was also DEFENDANT's  
24 uniform policy and practice to not provide all legally required meal and rest breaks to the  
25 PLAINTIFF and the CALIFORNIA CLASS Members. DEFENDANT's uniform practice  
26 requires the PLAINTIFF and the CALIFORNIA CLASS Members to work continuously  
27 throughout the workday without being supplied all meal and/or rest breaks in accordance with  
28 the number of hours they worked. At all relevant times during the CALIFORNIA CLASS  
PERIOD, DEFENDANT fails to provide any compensated work time for failing to provide such  
breaks to the PLAINTIFF and the CALIFORNIA CLASS Members.

56. Therefore, the PLAINTIFF demands on behalf of herself and on behalf of each  
member of the CALIFORNIA CLASS, one (1) hour of pay for each workday in which a meal

1 period was not timely provided for each five (5) hours of work, and/or one (1) hour of pay for  
2 each workday in which a second meal period was not timely provided for each ten (10) hours of  
3 work.

4 57. PLAINTIFF further demands on behalf of herself and on behalf of each member  
5 of the CALIFORNIA CLASS, one (1) hour of pay for each workday in which a rest period was  
6 not timely provided as required by law.

7 58. By the conduct alleged herein, DEFENDANT's practices are deceptive and  
8 fraudulent in that DEFENDANT's uniform policy and practice is to represent to PLAINTIFF and  
9 other CALIFORNIA CLASS Members that they are exempt from overtime pay when in fact these  
10 representations are false and likely to deceive, for which this Court should issue injunctive and  
11 equitable relief, pursuant to Cal. Bus. & Prof. Code § 17203, including restitution of wages  
12 wrongfully withheld.

13 59. By the conduct alleged herein, DEFENDANT's practices were also unlawful,  
14 unfair and deceptive in that DEFENDANT's employment practices caused the PLAINTIFF and  
15 the other members of the CALIFORNIA CLASS to be underpaid during their employment with  
16 DEFENDANT.

17 60. By and through the unlawful and unfair business practices described herein,  
18 DEFENDANT has obtained valuable property, money and services from the PLAINTIFF and the  
19 other members of the CALIFORNIA CLASS and has deprived them of valuable rights and  
20 benefits guaranteed by law and contract, all to the detriment of these employees and to the benefit  
21 of DEFENDANT so as to allow DEFENDANT to unfairly compete against competitors who  
22 comply with the law.

23 61. All the acts described herein as violations of, among other things, the California  
24 Labor Code, California Code of Regulations, the Industrial Welfare Commission Wage Orders,  
25 are unlawful, are in violation of public policy, are immoral, unethical, oppressive, and  
26 unscrupulous, and are likely to deceive employees, as herein alleged, and thereby constitute  
27 deceptive, unfair and unlawful business practices in violation of Cal. Bus. and Prof. Code §§  
28 17200, *et seq.*

62. PLAINTIFF and the other members of the CALIFORNIA CLASS are entitled to, and do, seek such relief as may be necessary to restore to them the money and property which DEFENDANT has acquired, or of which the PLAINTIFF and the other members of the CALIFORNIA CLASS have been deprived, by means of the above described unlawful and unfair business practices, including earned but unpaid overtime wages for all overtime hours worked.

63. PLAINTIFF and the other members of the CALIFORNIA CLASS are further entitled to, and do, seek a declaration that the described business practices are unlawful, unfair and deceptive, and that injunctive relief should be issued restraining DEFENDANT from engaging in any unlawful and unfair business practices in the future.

64. PLAINTIFF and the other members of the CALIFORNIA CLASS have no plain, speedy and/or adequate remedy at law that will end the unlawful and unfair business practices of DEFENDANT. Further, the practices herein alleged presently continue to occur unabated. As a result of the unlawful and unfair business practices described herein, the PLAINTIFF and the other members of the CALIFORNIA CLASS have suffered and will continue to suffer irreparable legal and economic harm unless DEFENDANT is restrained from continuing to engage in these unlawful and unfair business practices.

## **SECOND CAUSE OF ACTION**

### **For Failure To Pay Overtime Compensation**

**[Cal. Lab. Code §§ 510, 1194 and 1198]**

**(By PLAINTIFF and the CALIFORNIA LABOR SUB-CLASS and Against All Defendants)**

65. PLAINTIFF, and the other members of the CALIFORNIA LABOR SUB-CLASS, reallege and incorporate by this reference, as though fully set forth herein, paragraphs 1 through 63 of this Complaint.

66. Cal. Lab. Code § 510 states in relevant part:

Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of

1 work in any one workweek shall be compensated at the rate of no less  
2 than one and one-half times the regular rate of pay for an employee. Any  
3 work in excess of 12 hours in one day shall be compensated at the rate  
4 of no less than twice the regular rate of pay for an employee. In addition,  
any work in excess of eight hours on any seventh day of a workweek  
shall be compensated at the rate of no less than twice the regular rate of  
pay of an employee.

5 67. Cal. Lab. Code § 551 states that, "Every person employed in any occupation  
6 of labor is entitled to one day's rest therefrom in seven."

7 68. Cal. Lab. Code § 552 states that, "No employer of labor shall cause his  
8 employees to work more than six days in seven."

9 69. Cal. Lab. Code § 515(d) provides: "For the purpose of computing the  
10 overtime rate of compensation required to be paid to a nonexempt full-time salaried employee,  
11 the employee's regular hourly rate shall be 1/40th of the employee's weekly salary."

12 70. Cal. Lab. Code § 1194 states:

13 Notwithstanding any agreement to work for a lesser wage, any employee  
14 receiving less than the legal minimum wage or the legal overtime  
15 compensation applicable to the employee is entitled to recover in a civil  
16 action the unpaid balance of the full amount of this minimum wage or  
overtime compensation, including interest thereon, reasonable attorney's  
fees, and costs of suit.

17 71. Cal. Lab. Code § 1198 provides: "The maximum hours of work and the  
18 standard conditions of labor fixed by the commission shall be the maximum hours of work and  
19 the standard conditions of labor for employees. The employment of any employee for longer  
20 hours than those fixed by the order or under conditions of labor prohibited by the order is  
21 unlawful."

22 72. DEFENDANT has intentionally and uniformly designated certain employees as  
23 "exempt" employees, by their job title alone and without regard to DEFENDANT's realistic  
24 expectations and actual overall requirements of the job, including the PLAINTIFF and the other  
25 members of the CALIFORNIA LABOR SUB-CLASS who worked on the non-managerial side  
26 of DEFENDANT's business. This was done in an illegal attempt to avoid payment of overtime  
27 wages and other benefits in violation of the Cal. Lab. Code and Industrial Welfare Commission  
28 requirements.



1        73. For an employee to be exempt as a bona fide "executive," all the following  
2 criteria must be met and DEFENDANT has the burden of proving that:

- 3        (a) The employee's primary duty must be management of the enterprise, or of a  
4 customarily recognized department or subdivision; and,
- 5        (b) The employee must customarily and regularly direct the work of at least two (2) or  
6 more other employees; and,
- 7        (c) The employee must have the authority to hire and fire, or to command particularly  
8 serious attention to his or her recommendations on such actions affecting other  
9 employees; and,
- 10       (d) The employee must customarily and regularly exercise discretion and independent  
11 judgment; and,
- 12       (e) The employee must be primarily engaged in duties which meet the test of  
13 exemption.

14 No member of the CALIFORNIA LABOR SUB-CLASS was or is an executive because they all  
15 fail to meet the requirements of being an "executive" within the meaning of the applicable Wage  
16 Order.

17       74. For an employee to be exempt as a bona fide "administrator," all of the  
18 following criteria must be met and DEFENDANT has the burden of proving that:

- 19       (a) The employee must perform office or non-manual work directly related to  
20 management policies or general business operation of the employer; and,
- 21       (b) The employee must customarily and regularly exercise discretion and independent  
22 judgment; and,
- 23       (c) The employee must regularly and directly assist a proprietor or an exempt  
24 administrator; or,
- 25       (d) The employee must perform, under only general supervision, work requiring  
26 special training, experience, or knowledge; or,
- 27       (e) The employee must execute special assignments and tasks under only general  
28 supervision; and,

(f) The employee must be primarily engaged in duties which meet the test of exemption.

No member of the CALIFORNIA LABOR SUB-CLASS was or is an administrator because they all fail to meet the requirements for being an "administrator" under the applicable Wage Order.

75. The Industrial Welfare Commission, in Wage Order 4-2001, at section (1)(A)(3)(h), and Labor Code § 515 also set forth the requirements which must be complied with to place an employee in the "professional" exempt category. For an employee to be exempt as a bona fide "professional," all the following criteria must be met and DEFENDANT has the burden of proving that:

(a) The employee is primarily engaged in an occupation commonly recognized as a learned or artistic profession. For the purposes of this subsection, "learned or artistic profession" means an employee who is primarily engaged in the performance of:

- 1) Work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part or necessarily incident to any of the above work; or,
- 2) Work that is original and creative in character in a recognized field of artistic endeavor, and the result of which depends primarily on the invention, imagination or talent of the employee or work that is an essential part of or incident to any of the above work; and,
- 3) Whose work is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character cannot be standardized in relation to a given period of time.

(b) The employee must customarily and regularly exercise discretion and independent judgment; and,

1 (c) The employee earns a monthly salary equivalent to no less than two (2) times the  
2 state minimum wage for full-time employment.

3 No member of the CALIFORNIA LABOR SUB-CLASS was or is a professional because they  
4 all fail to meet the requirements of being a "professional" within the meaning of the applicable  
5 Wage Order.

6 76. PLAINTIFF, and the other members of the CALIFORNIA LABOR SUB-  
7 CLASS, do not fit the definition of an exempt executive, administrative, or professional employee  
8 because:

9 (a) They did not work as executives or administrators; and,

10 (b) The professional exemption does not apply to the PLAINTIFF, nor to the other  
11 members of the CALIFORNIA LABOR SUB-CLASS because they did not meet  
12 all the applicable requirements to work under the professional exemption for the  
13 reasons set forth above in this Complaint.

14 77. During the CALIFORNIA LABOR SUB-CLASS PERIOD, the PLAINTIFF, and  
15 the other members of the CALIFORNIA LABOR SUB-CLASS, worked more than eight (8)  
16 hours in a workday and more than forty (40) hours in a workweek.

17 78. At all relevant times, DEFENDANT failed to pay the PLAINTIFF, and the  
18 other members of the CALIFORNIA LABOR SUB-CLASS, overtime compensation for the hours  
19 they have worked in excess of the maximum hours permissible by law as required by Cal. Lab.  
20 Code §§ 510 and 1198, even though the PLAINTIFF, and the other members of the  
21 CALIFORNIA LABOR SUB-CLASS, are from time to time required to work, and do in fact  
22 work, overtime hours.

23 79. By virtue of DEFENDANT's unlawful failure to pay additional compensation  
24 to the PLAINTIFF, and the other members of the CALIFORNIA LABOR SUB-CLASS, for their  
25 overtime hours, the PLAINTIFF, and the other members of the CALIFORNIA LABOR SUB-  
26 CLASS, have suffered, and will continue to suffer, an economic injury in amounts which are  
27 presently unknown to them and which will be ascertained according to proof at trial.

28 80. DEFENDANT knew or should have known that the PLAINTIFF, and the other

members of the CALIFORNIA LABOR SUB-CLASS, were misclassified as exempt and DEFENDANT systematically elected, either through intentional malfeasance or gross nonfeasance, not to pay them for their overtime labor as a matter of uniform corporate policy, practice and procedure.

81. Therefore, the PLAINTIFF, and the other members of the CALIFORNIA LABOR SUB-CLASS, request recovery of overtime compensation according to proof, interest, costs, as well as the assessment of any statutory penalties against DEFENDANT, in a sum as provided by the Cal. Lab. Code and/or other statutes. To the extent overtime compensation is determined to be owed to members of the CALIFORNIA LABOR SUB-CLASS who have terminated their employment, these employees would also be entitled to waiting time penalties under Labor Code § 203, which penalties are sought herein. Further, the PLAINTIFF, and the other members of the CALIFORNIA LABOR SUB-CLASS, are entitled to seek and recover statutory costs.

82. In performing the acts and practices herein alleged in violation of labor laws and refusing to provide the requisite overtime compensation, DEFENDANT acted and continues to act intentionally, oppressively, and maliciously toward the PLAINTIFF, and toward the other members of the CALIFORNIA LABOR SUB-CLASS, with a conscious and utter disregard of their legal rights, or the consequences to them, and with the despicable intent of depriving them of their property and legal rights and otherwise causing them injury in order to increase corporate profits at the expense of the PLAINTIFF and the members of the CALIFORNIA LABOR SUB-CLASS.

### **THIRD CAUSE OF ACTION**

#### **For Failure to Provide Accurate Itemized Statements**

**[Cal. Lab. Code § 226]**

**(By PLAINTIFF and the CALIFORNIA LABOR SUB-CLASS and Against All Defendants)**

83. PLAINTIFF, and the other members of the CALIFORNIA LABOR

1 SUB-CLASS, reallege and incorporate by this reference, as though fully set forth herein,  
2 paragraphs 1 through 81 of this Complaint.

3 84. Cal. Labor Code § 226 provides that an employer must furnish employees  
4 with an "accurate itemized" statement in writing showing:

5 (1) gross wages earned,

6 (2) total hours worked by the employee, except for any employee whose compensation is  
7 solely based on a salary and who is exempt from payment of overtime under subdivision

8 (a) of Section 515 or any applicable order of the Industrial Welfare Commission,

9 (3) the number of piece-rate units earned and any applicable piece rate if the employee is  
10 paid on a piece-rate basis,

11 (4) all deductions, provided that all deductions made on written orders of the employee  
12 may be aggregated and shown as one item,

13 (5) net wages earned,

14 (6) the inclusive dates of the period for which the employee is paid,

15 (7) the name of the employee and his or her social security number, except that by January  
16 1, 2008, only the last four digits of his or her social security number or an employee  
17 identification number other than a social security number may be shown on the itemized  
18 statement,

19 (8) the name and address of the legal entity that is the employer, and

20 (9) all applicable hourly rates in effect during the pay period and the corresponding  
21 number of hours worked at each hourly rate by the employee.

22 85. At all times relevant herein, DEFENDANT violated Labor Code § 226,  
23 in that DEFENDANT failed to provide an accurate wage statement in writing that properly and  
24 accurately itemized the number of hours worked by the PLAINTIFF, and the other members of  
25 the CALIFORNIA LABOR SUB-CLASS at the effective regular rates of pay and the effective  
26 overtime rates of pay.

27 86. DEFENDANT knowingly and intentionally failed to comply with Labor Code §  
28 226, causing damages to the PLAINTIFF, and the other members of the CALIFORNIA LABOR

1 SUB-CLASS. These damages include, but are not limited to, costs expended calculating the true  
 2 hours worked and the amount of employment taxes which were not properly paid to state and  
 3 federal tax authorities. These damages are difficult to estimate. Therefore, the PLAINTIFF, and  
 4 the other members of the CALIFORNIA LABOR SUB-CLASS may elect to recover liquidated  
 5 damages of \$50.00 for the initial pay period in which the violation occurred, and \$100.00 for each  
 6 violation in subsequent pay period pursuant to Labor Code § 226, in an amount according to  
 7 proof at the time of trial (but in no event more than \$4,000.00 for the PLAINTIFF and each  
 8 respective member of the CALIFORNIA LABOR SUB-CLASS herein).

#### 10 **FOURTH CAUSE OF ACTION**

#### 11 **For Violation of the Private Attorneys General Act**

12 **[Cal. Lab. Code §§ 2698, *et seq.*]**

13 **(By PLAINTIFF and Against All Defendants)**

14 87. PLAINTIFF incorporates by reference the allegations set forth in paragraphs  
 15 1-86, supra, as though fully set forth at this point.

16 88. PAGA is a mechanism by which the State of California itself can enforce state  
 17 labor laws through the employee suing under the PAGA who do so as the proxy or agent of the  
 18 state's labor law enforcement agencies. An action to recover civil penalties under PAGA is  
 19 fundamentally a law enforcement action designed to protect the public and not to benefit private  
 20 parties. The purpose of the PAGA is not to recover damages or restitution, but to create a means  
 21 of "deputizing" citizens as private attorneys general to enforce the Labor Code. In enacting  
 22 PAGA, the California Legislature specified that "it was ... in the public interest to allow aggrieved  
 23 employees, acting as private attorneys general to recover civil penalties for Labor Code violations  
 24 ..." Stats. 2003, ch. 906, § 1. Accordingly, PAGA claims cannot be subject to arbitration.

25 89. PLAINTIFF brings this Representative Action on behalf of the State of California  
 26 with respect to herself and all other individuals who are or previously were employed by  
 27 DEFENDANT as District Sales Managers in California and who were classified as exempt from  
 28 overtime wages during the applicable statutory period of April 8, 2012 to the present (the

"AGGRIEVED EMPLOYEES").

90. PLAINTIFF gave written notice by certified mail to the Labor and Workforce Development Agency (the "Agency") and the employer of the specific provisions of this code alleged to have been violated as required by Labor Code Section 2699.3. On May 16, 2013, the Agency gave written notice by certified mail to the PLAINTIFF and the employer that it does not intend to investigate the allegations. See Exhibit #1, attached hereto and incorporated by this reference herein. As a result, pursuant to Section 2699.3, PLAINTIFF may now commence a representative civil action under PAGA pursuant to Section 2699 as the proxy of the State of California with respect to all AGGRIEVED EMPLOYEES as herein defined.

91. The policies, acts and practices heretofore described were and are an unlawful business act or practice because Defendant's (a) failure to properly record and pay PLAINTIFF and the other AGGRIEVED EMPLOYEES for all of the hours they worked, including overtime, (b) failure to provide accurate itemized wage statements, and (c) failure to timely pay wages, violates the applicable Labor Code sections listed in Labor Code §2699.5, including but not limited to Labor Code §§ 204, 226(a), 226.7, 510, 512, 1194, 1198, and the applicable Wage Order, and thereby gives rise to statutory penalties as a result of such conduct. PLAINTIFF hereby seeks recovery of civil penalties as prescribed by the Labor Code Private Attorney General Act of 2004 as the representative of the State of California for the illegal conduct perpetrated on PLAINTIFF and the other AGGRIEVED EMPLOYEES.

### **PRAYER FOR RELIEF**

WHEREFORE, the PLAINTIFF prays for judgment against each Defendant, jointly and severally, as follows:

1. On behalf of the CALIFORNIA CLASS:

- A) That the Court certify the First Cause of Action asserted by the CALIFORNIA CLASS as a Class Action pursuant to Fed R. Civ. Proc. 23(b)(2) and/or (3);
- B) An order requiring DEFENDANT to correctly calculate and pay all wages and all sums unlawfully withheld from compensation due to the PLAINTIFF and the other



- 1 members of the CALIFORNIA CLASS;
- 2 C) Restitutionary disgorgement of DEFENDANT's ill-gotten gains into a fluid fund
- 3 for restitution of the sums incidental to DEFENDANT's violations due to the
- 4 PLAINTIFF and to the other members of the CALIFORNIA CLASS according to
- 5 proof; and,
- 6 D) An order temporarily, preliminarily, and permanently enjoining and restraining
- 7 DEFENDANT from engaging in similar unlawful conduct as set forth herein.
- 8 2. On behalf of the CALIFORNIA LABOR SUB-CLASS:
- 9 A) That the Court certify the Second and Third Causes of Action asserted by the
- 10 CALIFORNIA LABOR SUB-CLASS as a Class Action pursuant to Fed R. Civ.
- 11 Proc. 23(b)(2) and/or (3);
- 12 B) Compensatory damages, according to proof at trial, including compensatory
- 13 damages for overtime compensation due to the PLAINTIFF and the other members
- 14 of the CALIFORNIA LABOR SUB-CLASS, during the applicable CALIFORNIA
- 15 LABOR SUB-CLASS PERIOD plus interest thereon at the statutory rate;
- 16 C) The greater of all actual damages or fifty dollars (\$50) for the initial pay period in
- 17 which a violation occurs and one hundred dollars (\$100) per each member of the
- 18 CALIFORNIA LABOR SUB-CLASS for each violation in a subsequent pay
- 19 period, not exceeding an aggregate penalty of four thousand dollars (\$4,000), and
- 20 an award of costs for violation of Cal. Lab. Code § 226; and,
- 21 D) The wages of all terminated employees from the CALIFORNIA LABOR SUB-
- 22 CLASS as a penalty from the due date thereof at the same rate until paid or until
- 23 an action therefore is commenced, in accordance with Cal. Lab. Code § 203.
- 24 3. On behalf of the State of California and with respect to all AGGRIEVED EMPLOYEES:
- 25 A. Recovery of civil penalties as prescribed by the Labor Code Private Attorneys
- 26 General Act of 2004.
- 27 4. On all claims:
- 28 A) An award of interest, including prejudgment interest at the legal rate;

1 B) Such other and further relief as the Court deems just and equitable; and,

2 C) An award of penalties and cost of suit, but neither this prayer nor any other  
3 allegation or prayer in this Complaint is to be construed as a request, under any  
4 circumstance, that would result in a request for attorneys' fees under Cal. Lab.  
5 Code § 218.5.

6 Dated: September 11, 2013

BLUMENTHAL, NORDREHAUG & BHOWMIK

7  
8 By: /s/Norman B. Blumenthal  
9 Norman B. Blumenthal  
10 Attorneys for Plaintiff  
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**DEMAND FOR A JURY TRIAL**

PLAINTIFF demands a jury trial on issues triable to a jury.

Dated: September 11, 2013

BLUMENTHAL, NORDREHAUG & BHOWMIK

By: /s/Norman B. Blumenthal

Norman B. Blumenthal

Attorneys for Plaintiff

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**EXHIBIT #1**



**STATE OF CALIFORNIA**  
**Labor & Workforce Development Agency**

GOVERNOR Edmund G. Brown Jr. • SECRETARY Marty Morgenstern

Agricultural Labor Relations Board • California Unemployment Insurance Appeals Board  
California Workforce Investment Board • Department of Industrial Relations  
Economic Strategy Panel • Employment Development Department • Employment Training Panel

May 16, 2013

**CERTIFIED MAIL**

Aparajit Bhowmik, Esq.  
Blumenthal, Nordrehaug & Bhowmik  
2255 Calle Clara  
La Jolla, CA 92037

RE: Employer: Avon Products, Inc. c/o CT Corporation System  
RE: Employee(s): Jacqueline Cavalier Nelson  
RE: LWDA No: 12878

This is to inform you that the Labor and Workforce Development Agency (LWDA) received your notice of alleged Labor Code violations pursuant to Labor Code Section 2699, postmarked April 16, 2013, and after review, does not intend to investigate the allegations.

As a reminder to you, the provisions of Labor Code Section 2699(i) provides that "...civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the LWDA for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code." Labor Code Section 2699(l) specifies "[T]he superior court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to this part."

Consequently, you must advise us of the results of the litigation, and forward a copy of the court judgment or the court-approved settlement agreement. Please be certain to reference the above LWDA assigned Case Number in any future correspondence.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Woo-Sam".

Mark Woo-Sam  
General Counsel

Cc: Avon Products, Inc. c/o CT Corporation System  
818 W. 7th Street  
Los Angeles, CA 90017

State of California  
Labor & Workforce Development Agency  
800 Capitol Mall, MIC-55  
Sacramento, CA 95814



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Blumenthal, Nordrehaug & Bohwmik  
2255 Calle Clara  
La Jolla, CA 92037

LWDA 12878

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